

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: LTDS CORPORATION, Complainant, v. IOWA TELECOMMUNICATIONS SERVICES, INC., d/b/a IOWA TELECOM, Respondent.	DOCKET NO. FCU-04-52
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**ORDER DENYING REQUEST FOR EMERGENCY INJUNCTIVE RELIEF AND
REQUIRING ADDITIONAL INFORMATION**

(Issued October 29, 2004)

INTRODUCTION

On Friday, October 22, 2004, at approximately 4:15 p.m., LTDS Corporation (LTDS) filed a "Complaint and Request for Emergency Injunctive Relief" (Complaint), asking the Board to issue a temporary injunction prohibiting Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom (Iowa Telecom), from discontinuing service to LTDS on Tuesday, October 26, 2004. LTDS also sought an order requiring Iowa Telecom to continue to negotiate a new interconnection agreement with LTDS, subject to the arbitration requirements of 47 U.S.C. § 252, and to continue to honor the existing interconnection agreement until a new agreement is

negotiated or arbitrated. The request for temporary injunction will be denied and the Board will require that the parties submit additional information regarding the appropriate course of this proceeding.

LTDS'S COMPLAINT

In support of its Complaint, LTDS states that it exchanges traffic with Iowa Telecom pursuant to an interconnection agreement that was originally scheduled to terminate on August 26, 2004, subject to automatic renewal for a one-year period if the agreement was not renegotiated or terminated in accordance with its terms. (Complaint, ¶¶ 3, 5.) The parties began negotiating amendments to the agreement in the Fall of 2003 and in April and May of 2004 they entered into an amendment that provided for a month-to-month extension of the agreement, rather than a full-year extension. The amendment is identified as Amendment No. 2. (Complaint, ¶¶ 5, 7; Attachment A.) The parties continued to negotiate.

On September 20, 2004, Iowa Telecom sent a letter to LTDS giving notice of Iowa Telecom's intent to terminate the agreement effective October 26, 2004. (Complaint, ¶ 8.) On September 29, 2004, LTDS responded with an electronic mail message stating that it believed the termination request was inconsistent with the amendment that changed the term of the agreement to month-to-month, but the message also indicates the issue would be addressed directly with another Iowa Telecom employee. (Complaint, Attachment C.) The Complaint does not show or allege that this was ever done.

On October 15, 2004, LTDS sent another electronic mail message to Iowa Telecom, requesting an extension of the October 26, 2004, deadline. Specifically, the message requests "a writing recognizing an extension. October 26 is coming fast." (Complaint, Attachment D, p. 3.) Iowa Telecom's response of October 18, 2004, did not address the extension request. On October 20, 2004, LTDS replied, stating:

[W]e need to know today whether Iowa Telecom will withdraw its notice terminating the interconnection agreement as of October 26. Otherwise, we may need to seek an emergency order to maintain the status quo while negotiations continue. . . . We do not consider Iowa Telecom's attempt to terminate the agreement as of October 26 to have been legally sufficient, but we prefer not to rely on our own interpretation and will seek Board intervention if we cannot work this through. May we hear from you today?

(Complaint, Attachment D, p. 2.) LTDS then alleges that Iowa Telecom "responded with [its] agreement in principle, and suggesting a two-week extension." (Complaint, ¶ 11.)

The next day, on October 21, 2004, Iowa Telecom sent a letter to LTDS stating that "Iowa Telecom will not agree to an extension." (Complaint, ¶ 12, Attachment E.) The letter also states: "Therefore, I reiterate, after October 26, 2004, Iowa Telecom will no longer provide services to LTDS on the terms and conditions specified in the current NIA [Negotiated Interconnection Agreement]." (Id.)

Finally, LTDS asserts that the "Board has historically been very firm on the point that commercial disputes between carriers should not burden customers" and

that the Board should not permit Iowa Telecom to engage in "unilateral discontinuance of service." (Complaint, ¶ 15.) On this basis, LTDS asks that the Board issue a temporary injunction and require continued negotiations.

IOWA TELECOM'S ANSWER

Iowa Telecom filed its "Answer and Resistance to Complaint and Request for Emergency Injunctive Relief and Motion to Dismiss" (Answer) on October 25, 2004. Iowa Telecom argues that in order to obtain preliminary injunctive relief, LTDS must show four elements: (1) a reasonable prospect for success on the merits; (2) irreparable harm; (3) impact on other parties; and (4) a balancing of the equities. (Answer, p. 1.) Iowa Telecom argues that LTDS has not met any of these elements, and especially the second, because "there is no threat of immediate customer harm as alleged." (*Id.*) Iowa Telecom then explains that the interconnection agreement will terminate on October 26, 2004, but that only means Iowa Telecom will stop providing new services to LTDS after that date. Service to existing customers will not be affected until November 25, 2004, at the earliest, allowing time to work out a smooth transition. (Answer, p. 2.)

In response to LTDS's claim that the Board has historically disfavored customer disconnection as a result of commercial disputes between carriers, Iowa Telecom argues that the Board decision relied upon by LTDS relied, in turn, on Iowa Code § 476.20 and a tariff on file with the Board, neither of which is relevant to this dispute. Instead, this dispute concerns a network interconnection agreement

approved by the Board pursuant to 47 U.S.C. §§ 251 and 252. Termination of the agreement is an explicitly foreseen event; if LTDS disputes Iowa Telecom's interpretation of the contract, it should have invoked the contract procedures for resolving the dispute, rather than waiting nearly a year to pursue its remedies. (Id.)

Iowa Telecom states that it gave LTDS notice of termination of the agreement, in writing, by letter dated October 29, 2003, a letter that LTDS does not even mention in its Complaint. (Answer, p. 3.) Thus, LTDS has had various options available to it for nearly a year, and should not be heard to complain, at the eleventh hour, that the contract cannot be terminated according to its terms. (Id.)

Iowa Telecom recognizes that Agreement No. 2 extended the term of the agreement on a month-to-month basis. According to Iowa Telecom, the complete text of the amended section of the agreement now reads as follows:

This agreement shall become effective in accordance with Section 23.8 (the "Effective Date"), and shall remain effective for a period of three (3) years. This Agreement shall continue in effect for consecutive one (1) year terms thereafter unless either Party gives the other Party at least ninety (90) calendar days written notice of termination, which termination shall be effective at the end of the initial term. **In the event the Parties have not concluded negotiations of a new interconnection, resale and unbundling agreement and such agreement has not been approved by the Iowa Utilities Board ("Board") by August 26, 2004, the parties agree not to extend the current agreement for twelve months but rather to extend the agreement on a month-to-month basis until such new agreement has been approved by the Board. Further, the Parties agree to continue good faith negotiations until a new agreement is executed.**

(Answer at p. 4, emphasis added by the Board to show the language added by Amendment No. 2.) Iowa Telecom argues that the original termination provision remains in the agreement and the required 90-day notice of termination was given on October 29, 2003. The amendment extended the agreement on a month-to-month basis so that it was terminable at the end of any month. (Id.) Iowa Telecom gave notice on September 20, 2004, that there would be no further extension after the next month, resulting in a termination date of October 26, 2004. (Answer, p. 5.)

Iowa Telecom disputes LTDS's assertion that on October 20, 2004, Iowa Telecom agreed in principle to a two-week extension. Iowa Telecom's entire statement on October 20, 2004, reads as follows:

I understand your point and agree that we would rather not have to resort to a legal debate. The folks from whom I need approval to extend this agreement are out of the office this morning, but I should be able to discuss this matter with them late this afternoon. I will try to get a response to you tonight or first thing tomorrow. I'd suggest no more than a two-week extension. Do you agree?

(Complaint, Attachment D, p. 1.) Iowa Telecom argues that this language "is abundantly clear that Mr. Porter was not agreeing to anything except to check with the people who could approve an extension." (Answer, p. 5.) The next day, Iowa Telecom clearly responded with a refusal to extend. (Id.)

LTDS'S REPLY

LTDS filed a "Reply Brief In Support Of Request For Emergency Injunctive Relief" (Reply) on October 26, 2004, in which it argues that Iowa Telecom's

termination notice of October 29, 2003, was of no effect because of Amendment No. 2. "That amendment preserved the 90-day notice requirement; it did not adopt a 30-day notice requirement." (Reply, p. 1.) LTDS argues it is entitled to a new 90-day notice before the amended agreement can be terminated.

LTDS also argues that its complaint meets the traditional four-factor test for injunctive relief. First, LTDS claims irreparable harm due to its loss of ability to accept new customers in most of its service territory, resulting in loss of goodwill and loss of competitive position. (Reply, pp. 2-3.) Second, LTDS argues it is likely to prevail on the merits, because the amended agreement still requires a 90-day notice of termination. (Id.) Third, LTDS argues "the balance of harms favors an injunction," since denial of an injunction will force LTDS to either turn away customers or accept whatever terms Iowa Telecom offers, while granting an injunction pending further negotiations or arbitration will only require Iowa Telecom to continue to provide service under terms and conditions to which it has previously agreed. Finally, LTDS argues the public interest favors an injunction because the public is served by competitive choice. (Id.)

ANALYSIS

In considering LTDS's request for emergency injunctive relief, the Board will consider the four factors the Supreme Court has identified as bearing on the determination of whether to issue a discretionary stay:

1. The likelihood the petitioner will prevail on the merits after full hearing;
2. Whether irreparable damage will be suffered if a stay is denied;
3. Whether the public interest calls for discretion to be exercised to deny the stay[; and]

* * *

- [4.] Would issuance of a stay substantially harm other parties interested in the proceedings?

Teleconnect Co. v. ISCC, 366 N.W.2d 511, 513 (Iowa 1985) (citations omitted).

1. The likelihood LTDS will prevail on the merits after full hearing

Here, the questions of whether, how, and when Iowa Telecom can terminate the existing interconnection agreement with LTDS depend upon the interpretation of the agreement and Amendment No. 2. Combined, the resulting termination provision is not a model of clarity. LTDS argues that the phrase "month-to-month" in the amended language really means a minimum of a 90-day extension, while Iowa Telecom argues that a year-old notice of termination was only partially affected by the subsequent amendment (by extending the agreement beyond August 26, 2004, on a month-to-month basis, essentially creating an implicit 30-day notice requirement). On the face of the document, it may be reasonable to say that the term "month-to-month" means exactly that, but at the same time the October 29, 2003, notice of termination was clearly mentioned in Amendment No. 2 and a fair reading of the amendment could lead to the conclusion that the amendment was intended to supersede the notice of termination. Based on the record to date, the Board cannot

say that either party is likely to prevail, so this factor does not support granting an injunction.

2. Will LTDS suffer irreparable damage if its request is denied?

LTDS alleges it will suffer irreparable damage if its request for temporary injunctive relief is denied and Iowa Telecom stops processing new customer orders for LTDS due to "loss of goodwill and loss of competitive position." (Reply, p. 3.) LTDS does not explain these terms or offer any affidavit or other support for its allegation. The Board understands these terms to mean LTDS believes it will suffer injury to its commercial interests, that is, ultimately a loss of earnings.

"Ordinarily, monetary losses caused by either administrative proceeding expenses or the deprivation of earnings are insufficient to constitute irreparable injury of substantial dimension." Riley v. Boxa, 542 N.W.2d 519, 522 (Iowa 1996) (citations omitted). Even a "substantial" loss of revenue may "not amount to irreparable damage." Teleconnect, 366 N.W.2d at 514, citing Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958).

Here, LTDS has not established or supported a claim of any identifiable, irreparable injury, whether it is loss of revenue or some other injury. This factor does not support granting a temporary injunction.

3. Does the public interest call for denial of the stay request?

The third factor is whether the public interest calls for denial of LTDS's request for a temporary injunction. LTDS points out that the public is served by competitive

choice, not by barring LTDS from accepting new customers. Moreover, LTDS argues its existing customers' interests will not be advanced if their service is disrupted in 30 days. (Reply, p. 3.) LTDS asserts that the public interest will best be served by requiring a 90-day notice period to ensure a smooth transition.

The Board agrees that giving customers a choice of communications service providers is generally in the public interest. See Iowa Code § 476.95(1). At present, however, there is no threat of disruption to existing customers and the parties have roughly 30 days to work toward averting or minimizing any potential disruption. Thus, the only part of the public that would be adversely affected by denial of a stay is that part that would like to order new services from LTDS during this period but cannot do so. The record does not contain any information regarding the number of customers likely to be affected in this manner. If it were expected to be a substantial number, LTDS should have provided that information to the Board (by showing the number of new customers or new service lines it added in Iowa Telecom's service territory in each of the last few months, for example). The Board finds that this factor weighs in favor of granting a stay, but only slightly, due to the lack of any attempt to quantify the impact.

4. Will issuance of a stay substantially harm other parties?

This factor is intended to balance the second factor, that is, irreparable damage to the party seeking a stay can be offset by a lesser showing of substantial damage to another party. Clearly, Iowa Telecom is of the opinion that its interests

would be harmed if it were required to continue to provide service to LTDS under the terms of the agreement, or else Iowa Telecom would not have taken steps intended to terminate the agreement. However, the record to date is silent regarding the extent of any such harm, whether real or alleged; this factor does not weigh for or against a stay.

CONCLUSION

Based on this analysis and the record assembled in this docket to date, the Board finds that LTDS has not shown that it is entitled to temporary injunctive relief at this time. Only one of the four factors offers any support for granting a stay and that support is tenuous, at best. The Board will deny the request for temporary injunction.

This leaves the question of what the next steps in this docket should be. Each of the parties has suggested that the other party has various remedies available to it, including further negotiations and arbitration by the Board pursuant to 47 U.S.C. § 252. However, neither party has actually requested arbitration or complied with the Board's rules regarding initiation of arbitration, see 199 IAC 38.7(3). Meanwhile, the clock is ticking toward November 25, 2004, when Iowa Telecom apparently intends to take action that may adversely affect existing LTDS customers (unless the parties are able to work out a transition to some other arrangement). Based on the correspondence attached to the pleadings, it appears the parties agree on the general propositions that they are going to operate under a new interconnection agreement in the future and that they will need to arbitrate certain terms of that

agreement. A major source of disagreement appears to involve the question of what terms and conditions will apply during the negotiation and arbitration period. LTDS prefers to continue the existing terms and conditions for as long as possible, while Iowa Telecom has suggested that LTDS should adopt one of Iowa Telecom's other existing interconnection agreements, even if only as an interim solution pending execution of a new agreement. (Complaint, Attachment E, pp. 1-2.)

It is difficult to accept the notion that reasonable parties will allow their existing relationship to terminate over the question of what terms and conditions should apply during a relatively brief interim period. The parties are encouraged to resolve this dispute themselves, but the Board will not allow this situation to develop into another eleventh-hour dispute. Therefore, the Board will direct LTDS and Iowa Telecom to submit additional filings, within seven days of the date of this order, each describing their proposed course of action for this docket and the Board's authority for taking that action. Thus, a party might suggest that the Board order adoption of a specific agreement on an interim basis while they negotiate and, if necessary, arbitrate, and the party might also advocate that the interim services should be subject to a true-up based on the final negotiated or arbitrated agreement. However, any such suggestions must be accompanied by a legal analysis demonstrating the Board's authority to pursue that party's desired course of action.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The request for emergency injunctive relief filed in this docket on October 22, 2004, by LTDS Corporation is denied.
2. The parties are directed to make supplemental filings, within seven days of the date of this order, as described in the body of this order.

UTILITIES BOARD

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 29th day of October, 2004.